



CHAPTER FOUR

TRIAL

I. Commonwealth's Case.

The Commonwealth's case requires critical legal strategic decisions in areas such as jury selection, opening statements, and cross-examination techniques. For a thorough discussion of general trial strategy issues, see MANUAL, Chapter Five. The following discussion is limited in scope to trial issues for which Virginia has case or statutory authority.

A. Voir Dire (BACIGAL at §§16–4 through 16–6).

In *Smith v. Commonwealth*, 40 Va. App. 595, 580 S.E.2d 481 (2003), the court reversed Smith's convictions in a jury trial of the rape, object sexual penetration and attempted rape of two girls, one twelve and the other seventeen at the time of the incidents because the trial court erred in denying his motions for curative instructions to correct improper comments made by the prosecutor during *voir dire* and closing arguments. The prosecutor in this case urged that it was common for children to not report sexual assaults right away, and those comments were made both in *voir dire* and during summation. Although the court made a general cautionary instruction late in the case they did not address the specifics of the prosecutor's arguments. The Court concluded that the comments were improper as they amounted to testimony, and on matters that were not put into evidence at trial. The Court also opined that "*voir dire* is not an opportunity for attorneys to testify or argue to the jury, especially regarding facts that will not be put into evidence." *Id.* at 601, 580 S.E.2d at 484. In *Skipper v. Commonwealth*, 23 Va. App. 420, 477 S.E.2d 754 (1996), the Court of Appeals ruled that the trial court did not violate the rights of a defendant charged with forcible rape and sodomy of a sixteen-year-old girl when it refused to permit questions of the jury venire regarding whether any juror had ever caught a child in a lie. See Victor I. Vieth, Using Voir Dire to Reduce Juror Bias in Child Abuse Cases," 11 *Update*, No. 7 (1998).

B. Opening Statement.

See the general discussion in BACIGAL at §17–5.

C. Testimony of the Victim.

1. Competency of Children (Va. Code Ann. §8.01–396.1; BACIGAL at §17–12; FRIEND at §6–2; BACIGAL, TATE & GUERNSEY at 44; VIRGINIA EVIDENCE at §3.3).

In 1993 the Virginia General Assembly enacted legislation creating a presumption that children shall not be deemed incompetent to testify solely because of age. Va. Code Ann. §8.01–396.1. See Appendix B for the text of this provision. See also MANUAL, Chapter 5, part IV.C. Prior to the enactment of this provision, Virginia case law provided the following rules for determining competency:

- "There is no fixed age at which a child must have arrived in order to be competent as a witness." *Rogers v. Commonwealth*, 132 Va. 771, 111 S.E. 231 (1922) (child two months

short of sixth birthday competent). *See also Mackall v. Commonwealth*, 236 Va. 240, 372 S.E.2d 759 (1988), *cert. den.*, 492 U.S. 925 (1989) (six-year-old competent to testify concerning her mother's murder); *Kiracofe v. Commonwealth*, 198 Va. 883, 97 S.E.2d 14 (1957) (six-year-old victim and nine-year-old witness competent to testify); *Cross v. Commonwealth*, 195 Va. 62, 64, 77 S.E.2d 447, 448 (1953) (there is no specific age for determining competency, but six-year-old child in this case incompetent because she did not demonstrate an independent recollection of the events and merely repeated what her mother told her to say); *Mullins v. Commonwealth*, 174 Va. 472, 5 S.E. 2d 499 (1939) (four and one-half and six and one-half year-olds competent); *Davis v. Commonwealth*, 161 Va. 1037, 171 S.E. 598 (1933) (eight-year-old competent); *Durant v. Commonwealth*, 7 Va. App. 454, 375 S.E.2d 396 (1988) (seven-year-old's statement that his mother's attorney told him what to say went to the child's credibility and not his competency); *Royal v. Commonwealth*, 2 Va. App. 59, 341 S.E.2d 660 (1986), *rev'd on other grounds*, 234 Va. 403, 362 S.E.2d 323 (1987) (ten-year-old witness competent in spite of the child's inability to remember details of the events).

- “In order to be competent as a witness, the child must have sufficient mental capacity to observe the data about which it has testified and record it in its mind, and thereafter understand questions put to it and be able to give intelligent answers.” *Rogers, supra*, 132 Va. at 773, 111 S.E. at 231; *Kiracofe, supra*, 198 Va. at 840, 97 S.E.2d at 18–19.
- The child should be able to communicate the observed facts accurately at the trial. *Kiracofe, supra*, 198 Va. at 840, 97 S.E.2d at 18. However, limited contradiction of a victim's testimony goes to the victim's credibility and not to her competency. *Swanson v. Commonwealth*, 8 Va. App. 376, 378–79, 382 S.E.2d 258, 259 (1989) (ten-year-old victim competent to testify in indecent liberties trial after being unable to state the dates of the incidents on cross-examination even though she had testified on direct examination that the incidents occurred within a specified period of months).
- The child must be able to understand questions. *Kiracofe, supra*, 198 Va. at 840, 97 S.E.2d at 18–19.
- “There must also be a sense of moral responsibility, at least to the extent of a consciousness of a duty to speak the truth.” *Rogers, supra*, 132 Va. at 773, 111 S.E. at 231–32.
- Competency is determined at the time the child testifies rather than at the time the incident occurred. *Cross, supra*, 195 Va. at 64, 77 S.E.2d at 448.
- The fact that a child previously has been determined incompetent does not render him or her incompetent in a later proceeding. *Id.*
- Competency is determined by the judge on a case-by-case basis at the time the child is offered as a witness. The judge usually conducts a competency hearing prior to the child being offered as a witness. The trial court's determination of competency is within the sound discretion of the trial court and will not often be disturbed on appeal. *Carpenter v. Commonwealth*, 186 Va. 851, 44 S.E.2d 419 (1947).

See generally Jennifer Massengale, “Facilitating Children’s Testimony,” 14 *Update*, No. 6 (2001).

2. Uncorroborated Testimony of Victim (FRIEND at §4–16).

The testimony of the victim does not have to be corroborated to support convictions for the following crimes:

- Rape. *Snyder v. Commonwealth*, 220 Va. 792, 796, 263 S.E.2d 55, 57 (1980).
- Statutory rape. *Lear v. Commonwealth*, 195 Va. 187, 193, 77 S.E.2d 424, 427 (1953).
- Attempted rape. *Fisher v. Commonwealth*, 228 Va. 296, 299, 321 S.E.2d 202, 203-04 (1984).
- Sodomy. *Love v. Commonwealth*, 18 Va. App. 84, 89, 441 S.E.2d 709, 713 (1994).
- Aggravated sexual battery. *Garland v. Commonwealth*, 8 Va. App. 189, 191-92, 379 S.E.2d 146, 147 (1989).
- Object sexual penetration and carnal knowledge. *Hebden v. Commonwealth*, 26 Va. App. 727, 496 S.E.2d 169 (1998) (*en banc*; equally divided court), *rev’g* 25 Va. App. 448, 489 S.E.2d 245 (1997).

See Victor I. Vieth, “When a Child Stands Alone: The Search for Corroborative Evidence,” 11 *Update*, No. 6 (1999).

D. Hearsay (BACIGAL at §17–19; FRIEND at §§18–1 through 18–55; BACIGAL, TATE & GUERNSEY at 84–85; VIRGINIA EVIDENTIARY FOUNDATIONS at §§ 9.1 through 9.13).

Virginia has not enacted a statute providing special exceptions to the hearsay rule for criminal cases involving child sexual abuse. *Cf.* Va. Code Ann. §63.2-1522 (creating a special hearsay exception for civil proceedings involving the abuse or neglect of a child). Consequently, child out-of-court statements must either qualify as non-hearsay or fit within one of the standard common law hearsay exceptions.

1. Non-hearsay (FRIEND at §§18–3 through 18–4; BACIGAL, TATE & GUERNSEY at 85–87).

An out-of-court statement made by a child is not hearsay if it is not offered for its truth. For example, in *Church v. Commonwealth*, 230 Va. 208, 335 S.E.2d 823 (1985), a seven-year-old victim’s mother testified at trial that the victim told her she did not like the mother and father to have intercourse because sex was “dirty, nasty, and it hurt.” The court held that this statement was not hearsay because it was offered to show the child’s attitude toward sex and was not offered to prove the truth of the statement that sex is dirty, nasty and painful.

However, in *Kauffmann v. Commonwealth*, 8 Va. App. 400, 382 S.E.2d 279 (1989), the court held that statements by the victim introduced at the father’s trial for aggravated sexual battery were not used to show her state of mind. During the course of investigating the victim’s suicide, an investigator was told by friends of the victim that she had mentioned being molested by

her father. The investigator also discovered entries in the victim's diary in which she stated that her father was an "incestive [sic] molesting jerk." The trial court admitted these statements and the Court of Appeals reversed. The court stated:

[T]he statements made by [the victim] to her friends and her entries in the spiral notebook both recalled past events and described the cause of her emotional distress. There was no showing, nor, do we believe, could there be, why [the victim's] state of mind was relevant to any issue in the case. *Id.* at 407, 382 S.E.2d at 283.

- a. Prompt Complaint (GROOT at 423–424; FRIEND at §18-32; BACIGAL, TATE & GUERNSEY at 285–286).

In 1993 the General Assembly enacted Va. Code Ann. §19.2–268.2, which states: Notwithstanding any other provision of law, in any prosecution for criminal sexual assault under Article 7 (§18.2–61 et. seq.) of Chapter 4 of Title 18.2, a violation of §§18.2–361, 18.2–366, 18.2–370 or §18.2–370.1, the fact that the person injured made complaint of the offense recently after commission of the offense is admissible, not as independent evidence of the offense, but for the purpose of corroborating the testimony of the complaining witness.

Prior to the enactment of this section, the following rules had been developed, some of which apparently are not affected by §19.2–268.2, and others of which are changed by this provision:

- The prior rule that prompt complaints constitute inadmissible hearsay in a trial for any sexual offense other than rape or attempted rape is explicitly changed. For case law limiting it to rape and attempted rape, see *Leybourne v. Commonwealth*, 222 Va. 374, 282 S.E.2d 12 (1981) (prompt complaint inadmissible in contributing to the delinquency of a minor prosecution); *Moore v. Commonwealth*, 222 Va. 72, 278 S.E.2d 822 (1981) (prompt complaint inadmissible in sodomy prosecution); *Pepoon v. Commonwealth*, 192 Va. 804, 66 S.E.2d 854 (1951) (prompt complaint inadmissible in sodomy prosecution); *Garland v. Commonwealth*, 8 Va. App. 189, 379 S.E.2d 146 (1989) (prompt complaint inadmissible in aggravated sexual battery prosecution); *Kauffmann v. Commonwealth*, 8 Va. App. 400, 382 S.E.2d 279 (1989) (prompt complaint inadmissible in aggravated sexual battery prosecution).
- A prompt complaint is admissible to corroborate the victim's testimony. *Pepoon v. Commonwealth*, 192 Va. 804, 66 S.E.2d 854 (1951); *Haynes v. Commonwealth*, 69 Va. (28 Gratt.) 942 (1877). It is not hearsay because it is not admitted for its truth—it is admitted to show that a complaint was made (under the rationale that a report of abuse is less credible if it is not made immediately). However, the complaint is not admissible as "independent evidence of the offense charged." *Pepoon, supra*, 192 Va. at 810, 66 S.E.2d at 858. See *Cartera v. Commonwealth*, 219 Va. 516, 248 S.E.2d 784 (1978) (only the fact that the complaint was made is admissible).

- A victim's prompt complaint can be used to corroborate not just the victim's testimony, but also "other independent evidence of the offense." *McManus v. Commonwealth*, 16 Va. App. 310, 429 S.E.2d 475 (1993). Evidence of a "fresh complaint" of sexual abuse is not admissible without the victim's testimony because such evidence is admissible only as corroboration. *Commonwealth v. Wills*, 44 Va. Cir. 459 (Spotsylvania County 1998).
- A delay in making the complaint goes to the weight and not admissibility of the complaint. *Herron v. Commonwealth*, 208 Va. 326, 330, 157 S.E.2d 195, 198 (1967) (two day delay); *Lindsey v. Commonwealth*, 22 Va. App. 11, 467 S.E.2d 824 (1996) (two months delay). In *Woodard v. Commonwealth*, 19 Va. App. 24, 446 S.E.2d 328 (1994), a 13-year-old rape victim's complaints to a school friend and her aunt more than two months after the assault were held admissible under the recent complaint rule. However, in *Castelow v. Commonwealth*, 29 Va. App. 305, 512 S.E.2d 137 (1999), the Court of Appeals ruled that a girl's complaint of sexual abuse made sixteen months after it occurred was erroneously admitted into evidence without some explanation for the extraordinary delay.
- The fact that a complaint is made in response to questioning does not remove it from the rule. *Herron v. Commonwealth*, 208 Va. 326, 330, 157 S.E.2d 195, 198 (1967).

In *Almond v. Commonwealth*, No. 3071-01-2 (Va. App. Dec. 17, 2002) (unpublished), the defendant was convicted of the sexual battery and forcible sodomy of a seven-year-old girl, and the court concluded that the trial judge did not err in allowing the child's stepmother to testify regarding statements made to her by the girl pursuant to §19.2-268.2 of the Code. The Court of Appeals determined that although the statute does not require the court to make express factual findings on the record, it would be the better practice to do so. A juvenile victim's complaint of rape made to her mother ten months after the alleged rape was admissible under the "recent complaint" exception to the hearsay rule where the delay is explained by circumstances entirely consistent with both the circumstances and the fact that the assault was on a child victim. *Terry v. Commonwealth*, 24 Va. App. 627, 484 S.E.2d 614 (1997). The lack of "recentness" of the complaint goes to the weight of the evidence rather than its admissibility. *Id.* at 635, 484 S.E.2d at 618. Similarly, in *Mitchell v. Commonwealth*, 25 Va. App. 81, 486 S.E.2d 551 (1997), the Court of Appeals ruled that rebuttal testimony by the brother of a twelve-year-old victim of a sodomy proposal about statements the brother made to him was admissible as a recent complaint of sexual assault although it could not be admitted as a prior consistent statement.

- b. Prior Consistent Statements (FRIEND at §18-6; BACIGAL, TATE & GUERNSEY at 117-118; VIRGINIA EVIDENTIARY FOUNDATIONS at §5.10).

Prior consistent statements generally are inadmissible as self-serving hearsay. *Scott v. Moon*, 143 Va. 425, 434, 130 S.E. 241, 243 (1925). Such statements are admissible only in the following limited circumstances:

- To rehabilitate a witness who has been impeached with prior inconsistent statements on cross-examination. *Moore v. Commonwealth*, 222 Va. 72, 79, 278 S.E.2d 822, 826 (1981). Such statements are admissible only to restore credibility and are not admissible for their truth. *Id.* In *Moore*, the defendant was convicted of indecent liberties with a 12-year-old boy. During cross-examination, the defense attorney attacked the victim’s credibility by pointing out four inconsistent statements he had made. The court held it was proper for the Commonwealth to rehabilitate the boy with prior consistent statements. *See Creasy v. Commonwealth*, 9 Va. App. 470, 389 S.E.2d 316 (1990) (prior consistent statement of Commonwealth witness admissible to rehabilitate witness after impeachment by a prior inconsistent statement even though the prior inconsistent statement was introduced by the Commonwealth).
- To respond to suggestions by the defense that the child had a motive to falsify his or her testimony. *See Honaker Lumber Co. v. Kiser*, 134 Va. 50, 113 S.E. 718 (1922). The Commonwealth may offer the prior consistent statement to show it was made before the motive or opportunity to fabricate arose. *Scott v. Moon*, 143 Va. 425, 130 S.E. 241 (1925).
- To respond to allegations of recent fabrication by the child. *Skipper v. Commonwealth*, 195 Va. 870, 80 S.E.2d 401 (1954); *see also Manetta v. Commonwealth*, 231 Va. 123, 340 S.E.2d 828 (1986).

2. Exceptions to the Hearsay Rule (FRIEND at § 18-10 through 18-36; BACIGAL, TATE & GUERNSEY at 89-102).

a. Excited Utterance (FRIEND at §18-17; BACIGAL, TATE & GUERNSEY at 93-95).

Even though the admissibility of an excited utterance is determined on a case-by-case basis, Virginia courts have examined several factors affecting spontaneous statements of children. These factors include:

- The lapse of time between the “startling event” and the statement. In *Martin v. Commonwealth*, 4 Va. App. 438, 358 S.E.2d 415 (1987), the court upheld the admissibility of a statement of a 23-month-old infant that “that boy put his pee-pee on me” made anywhere from 15 seconds to five minutes after the event. The court noted that her red face and crying demonstrated she was affected by a startling event. Further, a medical examination indicated she had suffered an injury to her rectum.
- Whether the statement is made “impulsively on [the declarant’s] own initiative, or [is] a statement in response to a question.” *Id.* at 441, 358 S.E.2d at 417. The fact that a statement is made in response to a question does not in itself make the statement

inadmissible so long as the question is framed in a neutral manner, such as the question: “What happened?” *Id.* at 442, 358 S.E.2d at 418.

- Whether the statement is a self-serving declaration. *Doe v. Thomas*, 227 Va. 466, 471-72, 318 S.E.2d 382, 385 (1984).
 - A child’s inability to fabricate sexual events in detail. “[P]articularly in the case of statements made by young children, the element of trustworthiness underscoring the spontaneous and excited utterance exception finds its source primarily in the child’s lack of capacity to fabricate rather than the lack of time to fabricate.” *Martin, supra*, 4 Va. App. at 442, 358 S.E.2d at 418. *See also McCann v. Commonwealth*, 174 Va. 429, 439, 4 S.E.2d 768, 771 (1939) (a child “could not possibly have fabricated” a story minutes after an attempted rape).
 - In *Esser v. Commonwealth*, 38 Va. App. 520, 566 S.E.2d 876 (2002), a prosecution for rape and other sexual offenses committed against a 19-year-old physically and learning disabled victim, the young woman’s statements to her mother two days after the assault were admissible as excited utterances at the trial. The statements were volunteered by the young lady while she was crying hysterically because she thought her mother was going to place her back into the custody of her uncle, the defendant, and she was frightened that she would be assaulted again. Thus, the startling event that triggered the statement was her fear that she was going to be returned to the control of Esser and that provided the spontaneity for the statement. Similarly, in *Guy v. Commonwealth*, No. 2276-01-1 (Va. Ct. App. Aug. 6, 2002) (unpublished), the statements of an eight-year-old girl who had been sexually victimized to her mother were admissible under the “excited utterance” exception because of the context of the statements.
 - In *Walker v. Commonwealth*, 19 Va. App. 768, 454 S.E.2d 737 (1995), the Court of Appeals concluded that a statement made by a six-year-old girl to her aunt, her legal guardian, the morning after a sexual assault qualified as an excited utterance in light of the surrounding circumstances, including that she complained as soon as she was returned to the aunt’s custody.
- b. Statements Made for Purposes of Medical Diagnosis or Treatment (FRIEND at §18–19; BACIGAL, TATE & GUERNSEY at 98-99; VIRGINIA EVIDENTIARY FOUNDATIONS at §9.9).

A physician may testify as to a patient’s statements of “past pain, suffering and subjective symptoms” to show “the basis of the physician’s opinion as to the nature of the injuries or illness.” *Cartera v. Commonwealth*, 219 Va. 516, 518, 248 S.E.2d 784, 785-86 (1978). However, statements made by a victim to a doctor detailing the circumstances of a sexual assault and a description of the assailant do not fall within this exception to the hearsay rule. *Id.* In *Cartera*, the statements introduced went beyond descriptions of “past pain, suffering and subjective symptoms” and therefore were inadmissible. *Id.* The Virginia

Supreme Court ruled in *Jenkins v. Commonwealth*, 254 Va. 333, 492 S.E.2d 131 (1997), that the *en banc* Court of Appeals (22 Va. App. 58, 471 S.E.2d 785 (1996)) had erred in concluding that the trial court's admission of expert testimony regarding the sexual abuse of a two-year-old child constituted harmless error. Reversible error was committed by allowing a licensed clinical psychologist to testify that a child "had been sexually abused." 254 Va. at 336, 492 S.E.2d at 133-34. The court also had erred in permitting the psychologist to testify that the boy told him that he had been "sexed," because this hearsay evidence did not fit within any recognized exception to the hearsay rule.

3. Proof of Age

For more than 100 years, courts in the United States have allowed a witness to testify as to his or her age even though such testimony is based on hearsay. See John Wigmore, 2 EVIDENCE IN TRIALS AT COMMON LAW §667 (Chadbourn rev. 1979) (listing jurisdictions adopting this rule). Professor Myers states:

When a witness testifies to his own age or date of birth, a hearsay objection is technically possible. After all, one knows her birthday only because someone told her. The hearsay objection is seldom raised, however, and when it is, courts reject it. MYERS at §7.41.

Virginia courts are among the few in the country that have not ruled on the issue, but the long-established principle provides persuasive authority for allowing a victim to state his or her age.

An alternative method of proving age is to allow the finder of fact to determine the person's approximate age. For example, in *Jewell v. Commonwealth*, 8 Va. App. 353, 382 S.E.2d 259 (1989), the court held that the trial court could have determined as a matter of fact that the defendant was more than 18 years old. The court stated that "a defendant's physical appearance may be considered by a jury in determining his or her age." The court also quoted Wigmore's statement:

Experience teaches us that corporal appearances are approximately an index of the age of their bearer, particularly for the marked extremes of old age and youth. In every case such evidence should be accepted and weighted for what it may be worth. *Id.* at 356, 382 S.E.2d at 261 (quoting 2 Wigmore, *Evidence* §222 (Chadbourn rev. 1970)).

4. Prosecution Recess to Consult with Victim.

The Court of Appeals decided in *Will v. Commonwealth*, 31 Va. App. 571, 525 S.E.2d 37 (2000), that the Confrontation Clause of the Constitution was not violated by the trial court granting a recess to allow the Commonwealth's Attorney to talk with a testifying child victim.

- E. Expert Testimony (FRIEND at §17–14; BACIGAL at §17–13; BACIGAL, TATE & GUERNSEY at 68-78).

1. Province of the Jury (FRIEND at §17-14; BACIGAL, TATE & GUERNSEY at 73-74).

Experts may not invade the province of the fact finder by testifying as to the ultimate issue in the case. *Cartera v. Commonwealth*, 219 Va. 516, 519, 248 S.E.2d 784, 786 (1978) (expert testimony that a victim was in fact raped inadmissible). See *Freeman v. Commonwealth*, 223 Va. 301, 314-16, 288 S.E.2d 461, 468-69 (1982) (expert testimony that certain pictures of nude children appealed to “prurient interests” of children did not invade the jury’s right to determine whether the pictures were “obscene for children”).

2. Types of Testimony.

In *Mohajer v. Commonwealth*, 39 Va. App. 21, 569 S.E.2d 738 (2002), *aff’d*, 40 Va. App. 312, 579 S.E.2d 359 (2003) (*en banc*), the Court of Appeals affirmed that a sexual assault nurse examiner (SANE) could present expert testimony regarding the nature of an 18-year-old high school student’s injuries and whether they indicated consensual sexual contact during the victim’s first professional massage where she was allegedly subjected to a sexual assault.

3. Behavioral Evidence.

There are no published opinions in Virginia discussing the admissibility of child sexual abuse accommodation syndrome, a common area of expert testimony in cases of child sexual abuse. However, in *Davison v. Commonwealth*, 18 Va. App. 496, 445 S.E.2d 683 (1994), the Court of Appeals reversed convictions of a man for sexual assault of his stepdaughters because of the admission of testimony by an expert describing the recantation phenomenon in child sexual abuse cases without the use of hypothetical questions. However, in *Price v. Commonwealth*, 18 Va. App. 760, 446 S.E.2d 642 (1994), the Court upheld the admission of expert testimony that the deceased one-and-a-half-year-old daughter of defendant’s girlfriend was a victim of the battered child syndrome. The prosecutor in *Price* used a hypothetical question and the expert did not testify that Price was the criminal agent. *Id.* at 763, 446 S.E.2d at 644. In *Lane v. Commonwealth*, No. 2161-98-3, 1999 Va. App. LEXIS (Va. App. Sept. 28, 1999) (unpublished opinion), the Court of Appeals affirmed the convictions of a man for the rape and sodomy of his stepdaughter and ruled that the trial court properly admitted testimony of experts regarding the dynamics of victim recantation and the causes and effects of post-traumatic stress disorder. For a summary of case law on this topic from other jurisdictions, consult MYERS or contact the National Center at APRI. See also Mary-Ann Burkhart, “I take it back’: When a Child Recants,” 12 *Update*, No. 3 (1999).

F. Admissibility of Photographs (FRIEND at §13.12; BACIGAL, TATE & GUERNSEY at 243–249; VIRGINIA EVIDENTIARY FOUNDATIONS at §4.9).

Photographs are relevant if they “tend to show motive, intent, method, premeditation, malice, or the degree of atrociousness of the crime.” *Gray v. Commonwealth*, 233 Va. 313, 342-43, 356 S.E.2d 157, 173, *cert. denied*, 484 U.S. 873 (1987). The admission of photographs is within the sound discretion of the trial court. *Id.* See *Campbell v. Commonwealth*, 12 Va. App. 476, 405

S.E.2d 1 (1991) (court relies heavily on photographs in determining that evidence is sufficient to show intent in malicious wounding prosecution); *Diehl v. Commonwealth*, 9 Va. App. 191, 385 S.E.2d 228 (1989) (photographs of a child’s buttocks relevant in felony murder prosecution to show that punishment exceeded moderation in punishing the child); *Commonwealth v. Phillips*, 59 Va. Cir. 394 (2002) (Spotsylvania County) (circuit court ruled on a motion in limine that the probative value of photographs of the “dreadful housekeeping practices” of a mother were outweighed by their prejudicial effects in a prosecution for felony child neglect). A witness to the event must verify that the photograph fairly represents what the witness observed. *Saunders v. Commonwealth*, 1 Va. App. 396, 339 S.E.2d 550 (1986). The photographer does not have to testify. *Id.* Section 63.2-1520 permits photographs of an abused or neglected child to be admitted into evidence “in any subsequent proceeding” and provides that the court “may impose such restrictions as to the confidentiality of photographs of any minor as it deems appropriate.” See Christina Shaw, “Admissibility of Digital Photographic Evidence: Should it be Any Different Than Traditional Photography?,” 15 *Update*, No. 10 (2002).

Photographs also may be admissible in sentencing. See *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815 (1985) (photographs of the victim at the autopsy admissible); *Washington v. Commonwealth*, 228 Va. 535, 323 S.E.2d 577 (1984), *cert. den.*, 471 U.S. 1111 (1985) (color photograph of the nude body of the victim admissible to show the outrageousness of defendant’s conduct).

II. The Defense Case

A. Character and Credibility of the Defendant.

1. Character (FRIEND at §5–4; BACIGAL, TATE & GUERNSEY at 42–43; VIRGINIA EVIDENTIARY FOUNDATIONS at §6.2).

A defendant may always introduce evidence of his or her reputation for “pertinent character traits.” *Weimer v. Commonwealth*, 5 Va. App. 47, 52, 360 S.E.2d 381, 383 (1987) (reputation for veracity and peaceable nature). See also *Barlow v. Commonwealth*, 224 Va. 338, 297 S.E.2d 645 (1982) (reputation for non-violent behavior). However, once the defendant opens the door to character evidence, the Commonwealth may cross-examine character witnesses and introduce testimony showing the defendant’s bad character. *Weimer, supra*, 5 Va. App. at 52, 297 S.E.2d at 383. Testimony of an impeaching witness must be limited to reputation and may not include descriptions of specific acts. *Id.* at 53, 297 S.E.2d at 384. However, the prosecutor may ask a defense character witness whether the witness has heard of specific acts in order to determine the grounds of the witness’s knowledge. *Id.*

2. Impeachment (FRIEND at §§4–1 through 4–11; BACIGAL, TATE & GUERNSEY at 104–118; VIRGINIA EVIDENTIARY FOUNDATIONS at §§5.1–5.9).

There are a variety of ways in which the defendant’s credibility can be impeached. See MANUAL, Chapter 5, part IV.F.3.g.v. However, a defendant’s credibility cannot be impeached with evidence of prior convictions unless the conviction demonstrates lack of truth or veracity

of the defendant. *Chrisman v. Commonwealth*, 3 Va. App. 89, 348 S.E.2d 399 (1986) (indecent exposure does not involve deception or moral turpitude for purposes of determining the defendant's character for truthfulness). Although evidence of a prior conviction for contributing to the delinquency of a minor was erroneously admitted for impeachment purposes in *Jarrell v. Commonwealth*, No. 0984-01-4 (Va. Ct. App. June 18, 2002) (unpublished), because it is not a crime involving moral turpitude, it was harmless error because he had already been impeached with other prior convictions.

B. Admissibility of Defense Expert Testimony (FRIEND at §§17-14 through 17-25).

An expert must be familiar with the facts of the case; misuse of facts may result in exclusion of the expert's testimony. In *Waite v. Commonwealth*, 207 Va. 230, 148 S.E.2d 805 (1966), the Virginia Supreme Court held inadmissible an expert's opinion as to whether the victim's testimony was "fact or fantasy." The court stated: "[A]n opinion given without any examination of, or acquaintance with, the subject and formed on the basis of incorrect and incomplete information, is not an opinion on which a jury should rely and it does not constitute admissible testimony." *Id.* at 237, 148 S.E.2d at 810. In addition to the fact that the expert had never interviewed the victim, the court stated that the hypothetical question posed to the expert omitted many important details and misrepresented others. Therefore, the expert's testimony was improper. See James Dean May, "Good Things Come To Those Who Seek: Ten Tips For Finding Information on Defense Experts," 12 *Update*, No. 7 (1999).

1. Hypnosis of the Defendant (FRIEND at §14-8; BACIGAL, TATE & GUERNSEY at 102-103).

Statements made while under hypnosis are inadmissible. *Greenfield v. Commonwealth*, 214 Va. 710, 204 S.E.2d 414 (1974). Statements made under the influence of "truth serum" likewise are inadmissible. *Archie v. Commonwealth*, 14 Va. App. 684, 420 S.E.2d 718 (1992). In *Archie*, the court held inadmissible statements made by the defendant and observations of a psychiatrist made while the defendant was under the influence of sodium amytal (commonly referred to as "truth serum"). The court reasoned: i) a defendant taking sodium amytal is highly suggestible; ii) a defendant who intends to deceive may be able to continue the deception; and iii) a defendant may tell fantasy rather than fact while under the influence of the drug. *Id.* at 693, 420 S.E.2d at 723. Note, however, that the trial court in *Archie* allowed the expert to give an opinion formed as a result of this interview, and the Court of Appeals did not reverse this ruling. *Id.* at 694, 420 S.E.2d at 724.

2. Defendant Profile Evidence

There are no Virginia cases addressing whether an expert may testify that the defendant does or does not fit the profile of a child abuser. In *United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995), the United States Court of Appeals for the Fourth Circuit ruled that the district judge did not abuse his discretion in declining to admit defense expert testimony that defendant did not exhibit the characteristics of a "fixated pedophile." *Id.* at 1470-1473. See James M.

Peters, “Using the Abel Assessment for Sexual Interest to Infer Lack of Culpability in a Criminal Case,” 14 *Update*, No. 12 (2001).

3. Victim Profile Evidence

There are no Virginia cases addressing whether an expert may testify that the victim does or does not fit the profile of an abused child, other than the Price case above where expert testimony was accepted about the battered child syndrome. *Price v. Commonwealth*, 18 Va. App. 760, 446 S.E.2d 642 (1994). See Brian Holmgren, “Should Expert Testimony on Children’s Suggestibility Be Admissible?,” 10 *Update*, No. 2 (1997).

III. Common Defenses

The following discussion presents only a partial list of possible defenses in child abuse cases. For a more detailed discussion of other defenses, such as retaliation, custody issues, and brainwashing, see MANUAL, Chapter 5, part VIII.C.8. See, e.g., Mary-Ann Burkhart, “Child Abuse Allegations in the Midst of Divorce and Custody Battles: Convenience, Coincidence or Conspiracy?,” 13 *Update*, No. 10 (2000).

Nothing Happened. Virginia courts have heard and occasionally agreed with defense arguments that: children were coached by therapists into inventing claims of sexual abuse, *Fisher v. Commonwealth*, 11 Va. App. 302, 397 S.E.2d 901 (1990) (granting a new trial based on newly discovered evidence of coaching by a therapist that the court believed would explain why the victim had drawn a sexually explicit picture implicating the defendant); the victim was mentally ill, *Clinebell v. Commonwealth*, 235 Va. 319, 368 S.E.2d 263 (1988) (holding that an optometrist should have been allowed to testify that the victim suffered from “hysterical amblyopia,” a condition in which the person believes she cannot see but has no physiological problems); and that the victim was exacting revenge against the defendant, *Fisher v. Commonwealth*, 228 Va. 296, 321 S.E.2d 202 (1984) (the defendant claimed the ten-year-old victim made up story to retaliate because the defendant had sold her puppy); *Johnson v. Commonwealth*, 9 Va. App. 176, 385 S.E.2d 223 (1989) (the court accepted the claim that the defendant, a Baptist pastor, should have been allowed to testify that the victim falsely accused him because he tried to interfere in the victim’s lesbian relationship); *Garland v. Commonwealth*, 8 Va. App. 189, 379 S.E.2d 146 (1989) (the defendant should have been allowed to testify that the victim falsely accused him because she did not like his discipline).

Prosecutors should keep in mind the following strategies when responding to such defense arguments:

- The prosecutor may ask the child to provide sensory details such as sex-related smells, sounds, tastes and textures. See *Waite v. Commonwealth*, 207 Va. 230, 148 S.E.2d 805 (1966) (expert testimony about whether rape victim’s testimony was based on fantasy found inadmissible).
- The prosecutor may highlight the child’s naivete about sexual practices.
- If the child’s mental health problems are likely to be used by the defense, this issue should be raised in the Commonwealth’s case-in-chief to explain the child’s emotional problems as a consequence of the abuse. If the child was taking medication at the time of the assault or the

disclosure or is on medication during the trial, expert testimony may be necessary to explain the effects of the medication on the child's ability to give accurate testimony.

Misinterpretation of Innocent Touch. Rather than arguing that the incident did not occur, defendants occasionally argue that the act occurred but was misinterpreted. For example, in *Walker v. Commonwealth*, 12 Va. App. 438, 404 S.E.2d 394 (1991), the defendant told a seven-year-old victim to take down her pants while they were in room alone with door shut. The defendant then touched her vagina to see if she was "wet," allegedly because the victim and some young boys had been "touching" each other and the defendant was supposed to be disciplining her. The defendant said he had to "open" her vagina to see if she was "wet." Defendant's sole argument at trial was that any touching was not done with the requisite intent. The court held there was sufficient evidence to find defendant acted with the requisite intent.

The following strategies may help overcome this defense:

- Since the defendant admits to physical contact with the child, efforts by the defendant to keep the touching a secret are evidence of intent.
- Demonstrations by the child showing the touching on a doll or a model to demonstrate it was not innocent touching.
- Arguments that similar past crimes or uncharged acts by the defendant show lack of accident, motive or existence of a common design. See discussion *supra*, Chapter three, part II.B. for cases on other acts.

Someone Else Did It. Although identity of the defendant is not frequently at issue, defendants sometimes argue that someone else abused the child. See *Bridgeman v. Commonwealth*, 3 Va. App. 523, 351 S.E.2d 598 (1986) (defendant and victim in incest case claimed defendant was not the father of the baby). The following approaches may help counter this defense:

- The prosecutor should try to eliminate other suspects, especially when the child has a sexually transmitted disease or is pregnant.
- The prosecutor needs to be prepared to counter arguments that the rape shield statute does not apply.

Reasonable Doubt. The defense usually will argue the prosecutor failed to prove the case beyond a reasonable doubt. See *Morrison v. Commonwealth*, 10 Va. App. 300, 391 S.E.2d 612 (1990) (court held that victim's testimony corroborated by physician's testimony proved penetration beyond a reasonable doubt). In responding to this argument, prosecutors should let the jury know they cannot have it both ways—believe the child but acquit the defendant because of insufficient evidence. The jury should be urged to use the evidence they heard to make a decision—whether they think the child is truthful or whether they think she is lying. The testimony of the victim in and of itself is sufficient for conviction and the jury should be so instructed. See discussion *supra*, this Chapter, part I.A.2. concerning uncorroborated testimony of the victim. See also Victor I. Vieth, "Thirteen Tips for Cross Examining Child Abuse Defendants and Defense Witnesses," 13 *Update*, No. 6 (2000).

IV. Rebuttal Evidence

The following are frequent situations in which rebuttal evidence is necessary in child abuse prosecutions:

- When the defendant or defense witnesses lie on the stand about a detail central to the case, rebuttal witnesses may be needed to refute the testimony. *See* MANUAL, Chapter Five, part VII.E.
- If the Commonwealth did not present expert testimony in its case-in-chief but the defense did, an appropriate expert may be helpful on rebuttal. *See* MANUAL, Chapter Five, part VII.E.
- Some defendants assert that they would “never molest a child” or they “love children and would never harm one.” Such testimony may open the door to admission of prior bad acts with other child victims or signature acts with adult sex partners. For discussion of prior bad act cases, see discussion, *supra*, Chapter Three, part II.B.
- If the defense attorney presents good character witnesses on behalf of the defendant, the Commonwealth can respond with “bad character” witnesses. *See Land v. Commonwealth*, 211 Va. 223, 176 S.E.2d 586 (1970). “Bad character” witness testimony needs to be narrow and concise; such witnesses should testify that the defendant has a bad reputation, but discussion of specific bad acts on direct examination may result in a mistrial. *Weimer v. Commonwealth*, 5 Va. App. 47, 360 S.E.2d 381 (1987). If the defense attorney cross-examines a witness about the basis for the opinion that the defendant has a bad reputation and elicits examples of rumored prior bad acts, the defense attorney will be stuck with the witness’ answer without grounds to complain later.
- If the defense attorney presents witnesses to testify to the victim’s bad character, the Commonwealth will need “good character” witnesses lined up for rebuttal. Virginia courts allow evidence of specific acts of complaining witnesses in sex abuse cases to attack the complainant’s credibility. *Clinebell v. Commonwealth*, 235 Va. 319, 368 S.E.2d 263 (1988) (victim’s prior complaints of abuse admissible to show charged act probably did not occur). *See* discussion *supra*, Chapter Three, part I.B.4.
- The Court of Appeals reversed a conviction for sexual molestation of an eleven-year-old girl in *Blaylock v. Commonwealth*, 26 Va. App. 579, 496 S.E.2d 97 (1998), because the trial court erred in excluding the proffered testimony of two former neighbors of the victim that her reputation for truthfulness was bad in her old neighborhood. The remoteness of the reputation evidence was a matter of its probative value, rather than its admissibility. The prosecutor may need to be prepared to rehabilitate the victim in such a situation.

For more examples and discussion of rebuttal evidence, see MANUAL, Chapter Five, part VII.

V. Closing Arguments (BACIGAL at §18-5).

Closing arguments are crucial for summarizing evidence for the jury in a clear manner. However, a conviction can be reversed if the prosecutor makes improper statements that “certainly” and “substantially” cause prejudice to the defendant. *Jackson v. Commonwealth*, 12 Va. App. 798, 799, 406 S.E.2d 415, 416 (1991). The judge may grant a new trial if the prosecutor’s argument would

cause any reasonable person to conclude that the jurors were prejudiced. *Winston v. Commonwealth*, 12 Va. App. 363, 368-69, 404 S.E.2d 239, 242 (1991). Recall that in *Smith v. Commonwealth*, 40 Va. App. 595, 580 S.E.2d 481 (2003), the Court of Appeals reversed defendant's convictions in a jury trial of the rape, object sexual penetration and attempted rape of two girls because the trial court erred in denying his motions for curative instructions to correct improper comments made by the prosecutor during both *voir dire* and closing arguments. The prosecutor in this case urged that it was common for children to not report sexual assaults right away, and those comments were made in *voir dire* and during summation. Although the court made a general cautionary instruction late in the case, they did not address the specifics of the prosecutor's arguments. The comments were improper as they amounted to testimony on matters that were not put into evidence at trial. See Suzy Boylan, "Striking Hard Blows but not Foul Ones: Special Considerations in Closing Arguments in Child Abuse Trials," 11 *Update*, No. 10 (1998).

VI. Sentencing

A. Generally

Victim Impact Statement. Section 19.2–299.1 of the Code spells out what a victim impact statement must include (e.g. victim's name, psychological injury suffered, change in victim's lifestyle). The prosecutor may request that a victim impact statement be included in the presentence report if it is not requested by the court.

Mental Evaluation. To assist the court in determining the proper sentence, the Commonwealth's Attorney, the court, or the accused may request that a mental evaluation be performed on a defendant convicted of a crime indicating sexual abnormality. Va. Code Ann. §19.2–300.

Conditions on Sentencing. The prosecutor should urge the court to use its statutory authority to order any reasonable condition on sentencing that would protect the victim and potential future victims from the defendant. See Va. Code Ann. §19.2–303 (trial court may suspend sentence in whole or in part and may place conditions upon the sentence or probation). Trial courts have broad discretion in order to serve the purpose of rehabilitating criminals. The only restriction upon the issuance of conditions is that they be "reasonable." *Dyke v. Commonwealth*, 193 Va. 478, 484, 69 S.E.2d 483, 486 (1952). See *Loving v. Commonwealth*, 206 Va. 924, 147 S.E.2d 78 (1966), *rev'd on other grounds*, 388 U.S. 1 (1967) (determining reasonableness requires looking at nature of offense, background of offender and surrounding circumstances); *Nuckoles v. Commonwealth*, 12 Va. App. 1083, 1085, 407 S.E.2d 355, 356 (1991) (defendant given 20-year suspended sentence with several conditions for taking indecent liberties with a minor).

Some possible conditions include:

- Ordering the defendant to pay for the cost of the victim's past and future mental health counseling, or other forms of restitution. Va. Code Ann. §§19.2–303, 305, 305.1.
- Ordering the defendant to have no contact with the victim or the victim's family for a specified period of time.

- Prohibiting the defendant from being alone with any child under the age of 18 for a certain length of time.
- Using a suspended sentence to require a defendant to successfully complete mental health counseling as directed by the probation officer. See *Nuckoles v. Commonwealth*, 12 Va. App. 1083, 1087, 407 S.E.2d 355, 357 (1991) (Benton, J., dissenting) (noting that one condition of defendant’s probation was to submit to a mental health clinic for counseling to be approved by probation officer). The prosecutor should make it clear that the defendant must actively participate and not merely give “lip service” to the counseling.

See MANUAL, Chapter Three, part IV for further suggestions.

B. Sex Offender Registration

The Virginia General Assembly has enacted a sex offender and crimes against minors registration statute that mandates that convicted sex offenders register with the Department of State Police. Va. Code Ann. §§9.1–900 through–918. See Appendix B for the text of this statute.

VII. Post-conviction Issues

A. New Trial Based on Recantation

Before a court will order a new trial based on recantation, the defendant must show by clear and convincing evidence that the testimony of a witness at the first trial was false. *Fout v. Commonwealth*, 199 Va. 184, 98 S.E.2d 817 (1957). Virginia courts have not addressed when post-trial recantation by a child witness necessitates a new trial.

B. Bond Pending Appeal (Va. Code Ann. §8.01–676.1; Sup. Ct. R. 5:24)

A defendant may request to have a bond set pending any appeal to the Virginia Court of Appeals. Va. Code Ann. §8.01-676.1; Sup. Ct. R. 5:24. However, the concern post-trial is not whether the defendant will appear in court, as required, but whether the defendant poses a risk to the community. The prosecutor should argue for the defendant’s immediate incarceration, given the danger he poses to the victim and to other children. If this argument is unsuccessful, the prosecutor should attempt to set conditions on the bond prohibiting the defendant from having any contact with the victim and the victim’s family, either directly or indirectly.